

***THIS OPINION WAS NOT WRITTEN FOR PUBLICATION***

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 10

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte WILLIAM A. KURREK

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Appeal No. 97-4065  
Application 29/036,355<sup>1</sup>

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ON BRIEF

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Before HAIRSTON, KRASS and FLEMING, Administrative Patent Judges.

FLEMING, Administrative Patent Judge.

***DECISION ON APPEAL***

This design application is on appeal from a second rejection of the sole claim.

The ornamental design for a POOL CUE SHAFT HAVING A TAPERED  
TRIANGULAR CROSS-SECTION as shown and described.

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<sup>1</sup> Application for patent filed March 17, 1995.

The subject matter of the invention is a design for a triangular shaped pool cue as shown in Figures 1 through 15 in the application.

The Examiner relies on the following references:

Mereness	672,646	Apr. 23, 1901
Merritt	4,600,193	July 15, 1986

The claim stands rejected under 35 U.S.C. § 102 as being anticipated by Mereness. In addition, the claim stands rejected under 35 U.S.C. § 103 as being unpatentable over Mereness in view of Merritt.

Rather than reiterate the arguments of Appellant and the Examiner, reference is made to the brief and answer for the respective details thereof.

### ***OPINION***

We will not sustain the rejection of the claim under either 35 U.S.C. § 102 or 103.

In determining the patentability of a design, it is the overall appearance, the visual effect as a whole of the design, which must be taken in consideration. *In re Leslie*, 547 F.2d 116, 120, 192 USPQ 427, 429 (CCPA 1977). In determining whether a design patent application is properly rejected under 35 U.S.C. § 102, the prior art reference must show the same subject matter as that of Appellant's claim and must be identical in all material respects.

*See Hupp v. Siroflex of America*, 122 F.3d 1456, 1461, 43 USPQ2d 1887, 1890 (Fed. Cir. 1997). It is axiomatic that anticipation of a claim under § 102 can be found only if the prior art reference discloses every element of the claim. *See In re King*, 801 F.2d 1324, 1326, 231 USPQ 136, 138 (Fed. Cir. 1986) and *Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed. Cir. 1984).

Appellant argues that Mereness shows in Figure 9 a triangular strip with straight sides and fails to show the claimed rounded contours. On page 4 of the answer, the Examiner argues that it would have obvious to round the corners of the triangular strip shown in Figure 9.

As pointed out above, in order for us to find that Mereness' Figure 9 anticipates Appellant's claim, we have to find that Mereness teaches every limitation of the claim. We find that Mereness fails to teach the rounded contours as claimed and thereby we will not sustain the Examiner's rejection of the claim under 35 U.S.C. § 102.

The claim also stands rejected under 35 U.S.C. § 103 as being unpatentable over Mereness in view of Merritt. If this inquiry is to be made under 35 U.S.C. § 103, then the proper standard is whether the design would have been obvious to a designer of ordinary skill of the articles involved. *In re Nalbandian*, 661 F.2d 1214, 211 USPQ 782 (CCPA 1981). A fundamental element for a 35 U.S.C. § 103 rejection of a claimed design is "there must be a

reference, a something in existence, the design characteristics of which are basically the same as the claimed design in order to support a holding of obviousness." *In re Rosen*, 673 F.2d 388, 391, 213 USPQ 347, 350 (CCPA 1982).

We do not find that either Mereness or Merritt teaches the *Rosen* required something in existence, the design characteristics of which are basically the same as the claimed design. Appellant's claimed design is a polygon shaped billiard cue having an overall rounded appearance. Appellant's design further shows a triangular shaped billiard cue having rounded edges with the overall elongated, slender shaft having an angular three sided appearance. Merritt teaches a bat with one end portion having round or circular structure with the other end portion having a triangular end.

The proper test as stated in *Rosen* is whether there is a reference design, the design characteristics of which are basically the same as the claimed design. *In re Rosen, supra*. As shown above, neither the Mereness rounded billiard cue nor the Merritt bat having one end rounded and the other end triangular have the same visual effect as does Appellant's triangular shaped billiard cue having rounded edges with the overall elongated, slender shaft having an angular three sided appearance. Therefore, neither reference is a reference which shows the same basic design characteristics.

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The decision of the Examiner rejecting the Appellant's claim under 35 U.S.C. § 102 and 103 is reversed.

***REVERSED***

KENNETH W. HAIRSTON	)	
Administrative Patent Judge	)	
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	)	
	)	BOARD OF PATENT
ERROL A. KRASS	)	APPEALS AND
Administrative Patent Judge	)	INTERFERENCES
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MICHAEL R. FLEMING	)	
Administrative Patent Judge	)	

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